Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARCO DAMICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The first question is whether *McCarthy v. United States*, 394 U.S. 459 (1969), and the Court's recent decision in *Libretti v. United States*, ___ U.S. ___, 116 S.Ct. 356 (1995), represent settled Federal Criminal Rule 11 precedent? If yes, the court below erred while affirming petitioner's conviction under 18 U.S.C. § 924(c)(1). The absence of Rule 11 dialogue demonstrated no supporting factual basis for petitioner's guilty plea, beyond petitioner's plea agreement and statements of defense counsel that petitioner understood the nature and elements of the crime?

2. Is a pre-*Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995) guilty plea valid where the district court failed to develop a factual basis for either use or carry, beyond reference to a plea agreement?

(a) Should certiorari be granted to resolve circuit conflicts between the case below and the post-*Bailey* guilty plea decisions from the Second, Fifth and Eleventh Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner, Marco Damico, was one of several defendants charged in *United States v. Damico, et al.*, indictment 94 CR 723. Petitioner was the only appellant in the case below, *United States v. Damico*, 99 F.3d 1341 (7th Cir. 1996).

The United States is the plaintiff-appellee/respondent in these proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Marco Damico (hereafter petitioner), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 99 F.3d 1341.

JURISDICTION

The opinion and judgment of the court of appeals for the seventh circuit was entered on November 8, 1996 (App., *infra*, 1a-16a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

RULES AND STATUTES INVOLVED

Rule 11(c)(1), of the Federal Rules of Criminal Procedure in pertinent part states:

> **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered . . .

Rule 11(f), of the Federal Rules of Criminal Procedure states:

Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

18 U.S.C. § 924(c)(1) (West, 1990), in pertinent part states:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

18 U.S.C. § 1951 (West, 1990), in pertinent part states:

> **§ 1951. Interference with commerce by threats or violence.**
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person

or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right,

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT

1. On November 17, 1994 the Special March 1994 Grand Jury in Chicago returned a ten-count indictment charging petitioner and others with, *inter alia*, RICO conspiracy (R. 7). In substance, the indictment alleged that petitioner and others ran a gambling enterprise in the Chicago area from the late 1970s to approximately December 11, 1992.

Count five charged petitioner and Robert Abbinanti (Abbinanti) with conspiring to rob a card game in Lake Geneva, Wisconsin in violation of 18 U.S.C. § 1951. The robbery was to have occurred on November 29, 1989.

Count six charged that during the attempt robbery (as described in count five) Abbinanti and petitioner did ". . . knowingly use and carry a firearm with a silencer during and in relation to a crime of violence . . ." in violation of 18 U.S.C. §§§ 2, 924(c)(1) and 1951(a).

In connection with counts five and six, pretrial discovery revealed that petitioner had frequent contact with an erstwhile Chicago lawyer, Robert Cooley, who became a government informant in 1986. In October 1988, the informant informed petitioner of a private card game involving lawyers, doctors and possibly drug dealers. The informant encouraged petitioner to determine a plan to rob the private card game. Eventually, the informant, petitioner and Abbinanti schemed to rob the card game on November 29, 1989. In fact, there was no card game. Rather, at the address provided by the informant, a group of agents sat waiting for the attempted robbery. Abbinanti never appeared. No weapon was brandished or exposed (e.g., used or carried). The agents disbanded. The government conceded that petitioner neither left Chicago, nor actively participated in the alleged attempt robbery.

2. Petitioner was represented by counsel, but remanded pending trial. Pretrial, a plea agreement was struck. The government agreed to substitute an information charging petitioner and Abbinanti with violating 18 U.S.C. § 924(c)(1), *albeit* absent a silencer.

3. On May 1, 1995 petitioner, pursuant to a written plea agreement, appeared before the district court and entered a guilty plea to all counts, including the substituted single count § 924(c)(1) information which

deleted any reference to the silencer (R. 197; App., *infra*, 17a).[1]

The district court engaged petitioner in a Rule 11 dialogue, which included indictment waiver (R. 204). Petitioner does not assert that the district court's admonitions, *vis-a-vis*, waiver of indictment, jury trial and confrontational guarantees were flawed. Rather, when the district court sought a factual basis for the § 924(c)(1) offense and plea, neither the government, defense counsel nor the petitioner supplied the court with any factual basis supportive of the superseding information. The May 1, 1995, Rule 11 dialogue, in pertinent part, revealed:

> THE COURT: You are charged in the information with the commission of a felony, that is, with knowingly using and carrying a firearm during and in relation to a crime of violence on or about November 30th of 1989 in the Northern District of Illinois, Eastern Division, in violation of Title 18, United States Code, section 924(c). Do you understand that charge, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Von Hoene, let me just ask you this. Without going into any of the facts of that particular count, in summary form, what explanation have you given to Mr. Damico as to the nature of the charge in this one-count information?
>
> MR. VON HOENE [Defense Attorney]: Your Honor, I have communicated to him with regard to the statute at issue and the nature of the issue. We have

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[1] The Court granted certiorari in *Bailey v. United States* on April 17, 1995; 115 S.Ct. 1689.

discussed the facts that underline the one-count information which are also facts common to a portion of Count I of the indictment itself.

THE COURT: All right.

MR. VON HOENE: We have discussed his potential exposure under the statute and the factual basis upon which the plea of guilty is being entered. (ROP 5/1/95 at Tr. 9-10)

* * * *

THE COURT: All right. Now, Mr. Von Hoene, I'll first ask you, once again, without reference to any of the facts in the case, would you summarize for the Court exactly what you told your client he was charged with doing in this indictment?

MR. VON HOENE: Your Honor, we carefully reviewed the particular terms of the indictment with Mr. Damico as well as the statutes underlying the charges. We have also reviewed the evidence to date that has been provided, the discovery provided by the Government, and discussed with Mr. Damico its applicability to the particular charges. I believe he fully understands the nature of the charges against him both statutorily and factually.

THE COURT: All right. Mr. Damico, is that correct? Do you understand all of the charges that you are charged with?

THE DEFENDANT: Yes, Judge.

THE COURT: All right. And you have discussed these charges with Mr. Von Hoene, those charges that you intend to offer a plea of guilty to, including all possible defenses?

THE DEFENDANT: Yes. (ROP 5/1/95 at Tr. 14-15)

* * * *

THE COURT: All right. Mr. Damico, I indicated early on what you were charged with. At this time, I'm going to ask you with respect to each of the counts, I'm going to ask you to tell me in your own words what it is that you did.

With respect to Count I, where you are charged with knowingly and intentionally conspiring to conduct the affairs of an enterprise through a pattern of racketeering and the collection of unlawful debt, would you tell me with respect to that count what it is that you did?

(Discussion off the record.)

THE DEFENDANT: The things that are summarized in the indictment and in the agreement.

THE COURT: Okay. You've read—you've carefully read the plea agreement, and you know exactly what is contained in it, and you are in agreement with the facts as they are set forth in that agreement.

THE DEFENDANT: Yes, ma'am.

THE COURT: And is that correct, sir, with respect to Count II as well?

THE DEFENDANT: Yes, ma'am.

THE COURT: And is that correct with respect to Count III?

THE DEFENDANT: Yes.

THE COURT: And is that correct with respect to Count IV?

THE DEFENDANT: Yes.

THE COURT: And also Count V?

THE DEFENDANT: Yes.

THE COURT: And Counts VII and VII?

THE DEFENDANT: Yes, ma'am.

THE COURT: And also with respect to the one-count firearms charge in the information?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. King, would you please summarize, if you will, what your evidence would be if you were to bring this matter to trial?

MR. KING [AUSA]: Your Honor, if the matter were to proceed to trial, the Government would call witnesses in the form of agents from the FBI, the IRS, and the Chicago Police Department, and call experts from the Internal Revenue Service, and present physical evidence, including the tape recorded conversations and electronically monitored conversations involving the defendant, and they would set forth the facts which we have set forth in specificity in paragraph 5 from pages 3 to 11 with respect to each of the elements of this offense, Your Honor.

THE COURT: Okay. So all of the facts are set forth in paragraph 5?

MR. KING: Yes, Your Honor. (ROP 5/1/95 at Tr. 29-31)

* * * *

Defense and government counsel referred to the plea agreement as a substitute for the factual basis, absent further explanation. The district court eschewed seeking exploration of any factual recitations supportive of the § 924(c)(1) count.

4. Post-guilty plea, petitioner challenged certain Federal Sentencing Guideline calculations. The district court variously sustained and denied petitioner's USSG plaints. On October 3, 1995, petitioner was sentenced to seven years and three months in custody on the RICO-gambling-IRS counts, with an additional five-year consecutive sentence on the § 924(c)(1) count.

This petition challenges the § 924(c)(1) five-year consecutive sentence.

5. On December 12, 1995 petitioner filed his opening brief in the United States Court of Appeals for the Seventh Circuit. That brief did not challenge the district court's factual basis failings, *viz.*, § 924(c)(1). This Court's opinion in *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, was filed on December 6, 1995.

6. On March 12, 1996, petitioner, while immured at FCI Oxford, Wisconsin, filed a district court, post-conviction motion raising the question of *Bailey's* impact on his § 924(c)(1) sixty-month consecutive sentence. The district court thought the motion had merit, and urged that counsel request Seventh Circuit adjournment of petitioner's pending direct appeal so that the district court could address the *Bailey* issue. A prompt Seventh Circuit request was submitted, but rejected on March 12, 1996.

Following the Seventh Circuit adjournment rejection, the district court dismissed petitioner's post-conviction motion, finding that the pendency of the direct appeal left the district court without jurisdiction to decide the *Bailey* post-conviction issue (App., *infra*, 18a-19a).

7. On June 18, 1996, during the pendency of petitioner's direct appeal, the court of appeals granted him leave to file a supplemental brief which asserted that in *Bailey's* wake the § 924(c)(1) consecutive sentence was subject to vacation because the district court failed to develop any *on the record factual basis* for the § 924(c)(1) guilty plea. The court below disagreed, finding that plea agreement recitals comprised a factual basis substitute (App., *infra*, 3a-5a).

REASONS FOR GRANTING THE WRIT

QUESTION I

The Seventh Circuit's holding that a plea agreement, coupled with statements of defense counsel that the elements and offenses have been discussed with and understood by the defendant, provided a suitable substitute for Rules 11(c)(1) and 11(f) compliance. This lower court holding conflicts with decisions of the Court and several sister courts of appeals mandating realistic Rule 11 compliance. The factual basis supporting the guilty plea *must* be of record in order to guarantee that the defendant entered the plea knowingly and voluntarily.

The decision below conflicts with the Court's decisions requiring a clear on-the-record factual basis so that to ensure that the plea is knowing and voluntary. The circuits are divided on whether a substitute document (agreement) can serve as a factual basis where the guilty plea dialogue fails to probe the actual events giving rise to the charged offense. Finally, the court below declined to remand in light of *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995), Question II, *infra*.

1. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court vacated a guilty plea affirmation from the Seventh Circuit, 387 F.2d 838 (CA 7, 1968). *McCarthy* was decided pursuant to the Court's supervisory powers over the lower federal courts in connection with Rule 11 adherence, 394 U.S. at 464. While reversing the guilty plea and sentence below, the Court noted that by ". . . personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction

attack," 394 U.S. at 466-67. In connection with *factual basis,* Chief Justice Warren explained ". . . Rule 11 also requires the judge to satisfy himself that there is a *factual basis* for the plea. The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to *protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge,*" 394 U.S. at 467, nn. 18 and 19 omitted, italicized emphasis added.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court vacated a capital sentence where the guilty plea record failed to disclose the voluntariness of the guilty plea. Citing *McCarthy*, Justice Douglas wrote: "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, *it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts,*" 395 U.S. at 243, n. 5 (italicized emphasis added).

During the last term-of-Court, *Libretti v. United States*, ___ U.S. ___, 116 S.Ct. 356 (1995), was decided. *Libretti* challenged the forfeiture aspect of his plea agreement. As pertinent to this petition, Justice O'Connor noted that *Libretti's* guilty plea was voluntary because "After a lengthy exchange, in which the court reviewed each subparagraph describing the violations that composed the CCE charge and *Libretti* acknowledged each factual allegation, the District Court found that the guilty plea was

voluntary and factually based," 116 S.Ct. at 361.[2] Citing *McCarthy* and *Boykin*, Justice O'Connor explained:

> A forfeiture provision embodied in a plea agreement is of an entirely different nature. Forfeiture is an element of the sentence imposed following conviction or, as here, a plea of guilty, and thus falls outside the scope of Rule 11(f).

116 S.Ct. at 363.

While finding that the plea agreement, *viz.*, forfeiture is distinct from Rule 11(f), Justice O'Connor noted:

> We are unpersuaded that the Rule 11(f) inquiry is necessary to guarantee that a forfeiture agreement is knowing and voluntary. Whether a stipulated asset forfeiture is "factually based" is a distinct inquiry from the question whether the defendant entered an agreement to forfeit assets knowingly and voluntarily. Libretti correctly points out that Rule 11(f) is intended to ensure that a defendant's "plea of guilty" is knowing and voluntary. * * * *But a "plea of guilty" and a forfeiture provision contained in a plea agreement are different matters altogether. Forfeiture, as we have said, is a part of the sentence.*

116 S.Ct. at 364, italicized emphasis added.[3]

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[2] *Certiorari* was granted to resolve the circuit discord regarding the applicability of Rule 11(f) to asset forfeiture provisions contained in plea agreements, 116 S.Ct. at 362.

[3] Justices Ginsburg and Souter concurred, agreeing that asset forfeiture did not need a "factual basis," if part of a stipulated plea agreement, 116 S.Ct. at 369-70. Justice Stevens' dissenting opinion, expressed in his view that Rule 11(f) compels plenary exploration of forfeiture, as if it were part of the guilty plea, 116 S.Ct. at 370-71.

The failure of the district court to explore the factual basis for petitioner's guilty plea is startling. Petitioner pled guilty to an information alleging that on or about November 29, 1989, he and Abbinanti conspired to commit a § 924(c)(1) violation in relation to a crime of violence, 18 U.S.C. § 1951 (App., 17a). The charging information incorporated count five of indictment 94 CR 723 (R. 7). That count alleged that from approximately October 1988 through November 1989, petitioner, Abbinanti and the informant conspired to rob a card game. Toward the end of November 1989, the government informant told Abbinanti that the "private" card game would be in Lake Geneva, Wisconsin. Abbinanti was to rob the card game and take the card game monies. To that end, Abbinanti allegedly gained possession of a weapon (based on a statement from a different informant in 1994)—on November 28, 1989. The informant and Abbinanti discussed the location of the card game and its participants on either November 28 or November 29. As previously stated there was no card game; discovery disclosed that several federal agents sat around the table in a Lake Geneva, Wisconsin apartment awaiting Abbinanti. He never appeared. The feigned card game was never robbed. No weapon (or silencer) was ever displayed, let alone recovered. To this day, it is clear that Abbinanti never "used" a firearm when he allegedly traveled to Lake Geneva, Wisconsin on November 29, 1989. The government agreed that petitioner did not go to Wisconsin; that he never left the Chicago area and that the "card game" never existed.

It is debatable whether § 1951 (the related "[federal] crime of violence"), tethered to the § 924(c)(1)) could be considered a criminal offense under the agreed circum-

stances.[4] Petitioner's criminal complicity, if any, was only

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[4] *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270 (1960), explained that interference with commerce, and extortion were [the] two essential elements of a Hobbs Act crime. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference, 361 U.S. at 218. Circuit authorities analyzing the interplay between §§ 924(c)(1) and 1951 have found that in the absence of an interstate commerce nexus, the § 924(c)(1) falls, i.e., *United States v. Collins*, 40 F.3d 95, 99-101 (5th Cir. 1994), cert. denied, 115 S.Ct. 1986 (1995) (Section 924(c)(1) requires that the underlying offense be a federal crime and, as the robbery-of-Winn conviction for violation of section 1951(a) is now voided, the conviction for unlawful use of a firearm during that robbery also must be reversed.). In *Collins*, the reversing panel held that the theft of a company owner's personal vehicle, even where the stolen vehicle traveled in interstate commerce, could not support a section 1951(a) conviction, 40 F.3d at 99-100. Similarly, in *United States v. Mattson*, 671 F.2d 1020, 1023-25 (7th Cir. 1982), the court held that the extortion of private monies from an electrician had no interstate impact and could not support a § 1951 conviction.

In the ensemble, decisions such as *Collins* and *Mattson*, reveal that the impact on interstate commerce for § 1951 purposes relates to commercial or business enterprises, not individuals who are on private frolics. An attempt to aid and abet the robbery of a non-commercial card game, utterly fails to qualify for even a *de minimis* interstate commerce effect.

Post-*United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624 (1995), the lower courts have questioned whether a *de minimis* effect on interstate commerce supports federal jurisdiction. The Ninth and Eleventh Circuits have held that *Lopez* mandates a substantial effect on interstate commerce, *United States v. Denalli*, 73 F.3d 328, 330 (11th Cir. 1996); on rehearing, 90 F.3d 444 (11th Cir. 1986); *United States v. Pappadopoulous*, 64 F.3d 522, 526-7 (9th Cir. 1995); *United States v. Sherwood*, 98 F.3d 402, 410-11 (9th Cir. 1996) (affirming convictions under 18 U.S.C. § 1951 assuming the government's need to show a "substantial effect" on interstate commerce, 98

(continued...)

as an attempted-aider or abettor.[5] Under strikingly similar circumstances, the Second Circuit recently held that the absentee accomplice lacked § 924(c)(1) criminal complicity, *United States v. Medina*, 32 F.3d 40, 45-46 (2nd Cir. 1994) (However, to the extent that these cases imply that a defendant can aid and abet the use or carrying of a firearm without performing some affirmative act relating to that firearm, we disagree; collecting conflicting

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[4] (...continued)

F.3d at 411; cf., *United States v. Quigley*, 53 F.3d 909, 910-11 (8th Cir. 1995) (affirming district court judgments of acquittal in § 1951 where local robberies had no impact on interstate commerce). Post-*Lopez*, the Seventh Circuit remains committed to *de minimis* standard, *United States v. Stillo*, 57 F.3d 553, 558, n. 2 (7th Cir. 1995) (rejecting challenge to *de minimis* after *Lopez*).

The Ninth Circuit has recently noted that § 924(c)(1) contains a jurisdictional element, *viz.*, interstate commerce, *United States v. Staples*, 85 F.3d 461, 463 (9th Cir. 1996) (". . . § 924(c)(1) contains a jurisdictional element which ensures, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.") (citing *Lopez*).

Here neither the parties nor the district court made any reference to "interstate commerce" for either §§ 1951 or 924(c)(1).

[5] The facts alleged in count five reveal an "attempt to aid and abet." There is federal authority for the proposition that an attempt to aid and abet cannot rise to the level of a cognizable criminal offense, *United States v. Giovanetti*, 919 F.2d 1223, 1227 (7th Cir. 1990) (". . . it sounds more like attempted aiding and abetting, a crime that the American law institute thinks should exist, Model Penal Code § 2.06(3)(a)(ii), but that probably does not exist under federal law because of the interpretation of the courts place on aiding and abetting. . . .") (Posner, J.); *United States v. Coffman*, 94 F.3d 330, 333 (7th Cir. 1996) (". . . it is not a criminal attempt to try to do what the criminal law does not forbid you to do.") (Posner, C.J.).

§ 924(c)(1) authorities from the Fifth, Sixth, Seventh and Eleventh Circuits, 40 F.3d at 46; appeal after remand, 74 F.3d 413 (2nd Cir. 1996); *United States v. Giraldo*, 80 F.3d 667, 676 (2nd Cir. 1996) (reversing § 924(c)(1) as to two defendants—proof simply that a defendant knew that a firearm would be carried, even accompanied by proof that he performed some act to facilitate or encourage the underlying crime in connection with which the firearm was carried, is insufficient to support a conviction for aiding and abetting the carrying of a firearm).

2. Petitioner's guilty plea implicated complex conspiracy offenses. At best, he was charged with attempting to aid and abet a conspiracy to rob a private card game, where the putative robber used and carried a firearm. Hence, conspiracy, § 2 (aiding and abetting), § 1951 (Hobbs Act/affecting interstate commerce) and § 924(c)(1) are blended. Notwithstanding the complexity of the purported offense, the district court disdained an on-the-record-factual basis.

Circuit decisions following *McCarthy* have vacated guilty pleas where the district court failed to clearly develop factual basis in complex or conspiracy cases, e.g., *United States v. Lowery*, 60 F.3d 1199, 1205 (6th Cir. 1995) ("It is not difficult to understand that Pelfrey, a lay person, might not understand why he would be guilty of aiding and abetting the crime of "using and carrying" a firearm on these facts. Pelfrey did not possess a gun at all, and he did not help Lowery obtain or prepare the sawed-off shotgun."); *United States v. Goldberg*, 862 F.2d 101, 109 (6th Cir. 1988) (". . . when the crime alleged is a complex one, or an uncommon one as in this case, it is incumbent upon the district court to closely examine the

relationship between the law and the acts of the defendant. *McCarthy*, 394 U.S. 459. Assuring that there is a sufficient factual basis is intimately related to the question of whether the plea is entered into knowingly."); *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (". . . The charge of utilizing a communication facility to further a conspiracy or in the commission of a conspiracy is a complex charge that a lay person would not easily understand. To fully understand the charge against him, defendant must have understood what it meant to be a member of a conspiracy and to act in furtherance of that conspiracy. * * * Because the charge in the indictment is complex and the Court failed to determine that defendant understood it, the reading of the indictment and defendant's response that he had no further questions do not establish a factual basis for the plea."); *United States v. Smith*, 60 F.3d 595 (9th Cir. 1995) (vacating guilty plea and conviction for non-compliance with Rule 11(c)(1) notwithstanding prosecution's factual basis allocution and written plea agreement; trial court's dialogue with the defendant and counsel that they had discussed the subject matter of the plea insufficient notwithstanding defense counsel's statement that defendant was making ". . . the plea with a full understanding of the nature of the charges and the consequence of the plea."; 60 F.3d at 597).[6]

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[6] The First Circuit has consistently held that Rule 11 non-compliance can be reviewed on direct appeal, where the defendant did not challenge non-compliance in the district court. In *United States v. Daniels*, 821 F.2d 76, 81 (1st Cir. 1987), now Justice Breyer explained the reason: "Because adherence to Rule 11 protects not only the parties, but also the " 'fair-

(continued...)

Based on *McCarthy* and its progenies, the district court's failure to develop a factual basis for the plea at hand renders petitioner's guilty plea and consecutive sentence invalid. To the extent that the decision below conflicts with Sixth and Ninth Circuit decisions, *certiorari* is warranted to resolve the circuit conflicts.

3. The circuits are divided on whether a written document, such as a plea agreement, can validate a guilty plea where Rule 11 dialogue fails to develop a factually supportive basis for the plea. For example, in *United States v. Medina-Silveria*, 30 F.3d 1, 3 (1st Cir. 1994), the court vacated the guilty plea and sentence where the district court made the plea agreement part of the proceedings, while failing to develop a factual basis for the plea. While identifying the core Rule 11 concerns (absence of coercion, understanding of charges, and knowledge of consequences of guilty plea), the court noted that "[A] violation that implicates one of the rule's core conerns mandates that the plea be set aside," (citing *McCarthy*). The reversing panel explained [that] ". . . the authorities are in agreement that reliance on a 'written document is not a sufficient substitute for personal examination [by the court.]' ";[7] *United States v. Gray*, 63

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[6] (...continued)
ness, integrity [and] public reputation of judicial proceeding,' " other appellate courts have applied the requirement of raising questions below less strictly in the Rule 11 context, sometimes considering Rule 11 violations *sua sponte*."

[7] Citing James W. Moore, 8 *Moore's Federal Practice* ¶ 11.-05[2] (1994); Charles A. Wright, 1 *Federal Practice & Procedure* § 172 (1982) ("Since 1966 the rule has required the court to address the defendant personally.").

F.3d 57, 60-61 (1st Cir. 1995) (reliance on a written document is an insufficient proxy for personal examination by the court); *United States v. Bernal*, 861 F.2d 434, 437 (5th Cir. 1988) (citing *McCarthy*, "Reliance on a signed statement, or on a statement which the defendant purports to read to himself in the presence of the district court, to establish that the accused understands the nature of the charges opens the door to later claims by the accused that he did not read or understand what he signed"); on denial of rehearing, 871 F.2d 490, 491 (5th Cir. 1989) (such an interpretation of Rule 11 would allow the district judge to sit in his chambers and accept a guilty plea so long as the accused signed papers reflecting his voluntary, knowing agreement to enter the plea); *United States v. Del Prete*, 567 F.2d 928, 930 (9th Cir. 1978) ("[a] written document is emphatically not a substitute for the clear dictate of the rule, which requires that the trial judge address the defendant in open court"); *United States v. Smith*, 60 F.3d 595, 599 (9th Cir. 1995) (acknowledgement of signed plea agreement setting forth factual basis insufficient; ". . . Thus, 'court room recitals that the defendant has read the agreement simply does [sic] not take the place of the judge's telling the defendant' the requisite Rule 11(c) information. . . .").

Thus, the First, Fifth and Ninth Circuits refuse to allow a written document (e.g., plea agreement) to stand as a Rule 11 substitute. In juxtaposition, the Seventh Circuit in the case at hand, held that Rule 11 can be satisfied by virtue of the defendant acknowledging that at some point in time he read and signed an out-of-court

document.[8] Neither *McCarthy* nor subsequent Court decisions have held that Rule 11 can be satisfied in the fashion approved by the court below. *Libretti* emphasized that Rule 11(f) was a mandated part of the guilty plea process and "[a] plea of guilty and a forfeiture provision contained in a plea agreement are different matters altogether. Forfeiture, as we have said, is a part of the sentence."[9] Rule 11 decisions have never held that the district court could abrogate its "core" concerns (*inter alia*, understanding the nature of the charges and knowledge of the consequence of the plea) to a written document prepared by the attorney, albeit acknowledged by the accused.[10]

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[8] Ironically, the decision below is in direct conflict with an earlier Seventh Circuit decision, *United States v. Fountain*, 777 F.2d 351, 356 (7th Cir. 1985) ("Whatever the exact nature of the colloquy it is essential that it be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind as required by Rule 11. *McCarthy*, 394 U.S. at 467, 89 S.Ct. at 1171; . . .").

[9] 116 S.Ct. at 363-364.

[10] At App. 5a the court below cited, *inter alia*, *United States v. Rivas*, 85 F.3d 193 (5th Cir. 1996) and *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996), in support of affirmation. Both are inapposite. In those cases, the government articulated a clear § 924(c)(1) factual basis to support the guilty pleas. In *Rivas*, the government gave a detailed factual basis showing that at the time *Rivas* was arrested he was carrying a pistol in the front of his pants, 85 F.3d at 195. In *Riascos-Suarez*, the government's factual basis allocution revealed that the defendant was carrying cash, drugs and a loaded .380 Beretta pistol at the time of arrest, 73 F.3d at 622. In juxtaposition, the government's allocution in this case mere-

(continued...)

QUESTION II

Is a pre-*Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995) guilty plea valid where the district court failed to develop a factual basis for either use or carry, beyond reference to a plea agreement?

1. An impediment to affirmation entails consideration of *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995). Certiorari had been granted on April 17, 1995. The petitioner entered his guilty plea on May 1, 1995. The record is barren of any suggestion that either petitioner or defense counsel was aware of the Court's granting of review to resolve the § 924(c)(1) use and/or carry circuit conflict. Petitioner was sentenced on October 3, 1995. The Court decided *Bailey* on December 6, 1995.

Petitioner's opening brief, filed on December 12, 1995, neither mentioned *Bailey*, nor raise the obvious "use and carry" conundrum which developed in *Bailey's* aftermath. After oral argument, petitioner was given an opportunity to present his direct appeal, *Bailey*-related arguments in supplemental briefs.

Several courts of appeals have considered *Bailey's* impact on § 924(c)(1) guilty pleas that had been entered prior to the Court's decision. Emblematic is *United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996). In *Andrade*, the court vacated the § 924(c) conviction and sentence

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[10] (...continued)
ly refers to the plea agreement and a nebulous statement regarding government witnesses (ROP 5/1/95 at Tr. 30-31, *ante* at pg. 8).

because *Bailey's* intervention demonstrated there was no factual basis for the perpetuation of that conviction and mandated consecutive sentences. The reversing panel found that the factual basis was lacking even though at the time of the plea, there was no infirmity. Nonetheless, in *Bailey's* wake, the *Andrade* panel reversed (the factual basis for *Andrade's* plea clearly established no more than mere possession and under *Bailey* is insufficient to support a conviction for use of a firearm in relation to the predicate drug offense, 83 F.3d at 730, n. 1 omitted). The reversing panel further noted that every circuit considering the question of *Bailey's* impact on previously valid guilty pleas (on pending direct appeals) had vacated the convictions and sentences, e.g., *United States v. Keebler*, 78 F.3d 598 (10th Cir. 1996); *United States v. Abdul*, 75 F.3d 327 (7th Cir. 1996); *United States v. Garcia*, 1996 WL 128123 (8th Cir. 1996). Cutting to the chase, *Andrade* involved an instance where intervening law established that the actions of the defendant did not constitute a crime, and thus the defendant was actually innocent of the charged offense, 83 F.3d at 731.

In *United States v. Quinones*, 97 F.3d 473 (11th Cir. 1996), the court vacated the § 924(c)(1) guilty plea and sentence notwithstanding a written plea agreement. *Id.* at 474. The reversing panel held that the district court's failure to comply with Rule 11 is analyzed only on the record of the Rule 11 proceeding, *viz.*, harmless error *vel non*. *Id.* at 475.[11] In accord, *United States v. Cruz-Rojas*,

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[11] The reversing panel noted the circuit discord on the application of "plain error" in Rule 11 situations where there was no objection below, but held that Rule 11 "core" concerns were

(continued...)

101 F.3d 283, 285-86 (2nd Cir. 1996) (vacating use and carry guilty plea convictions where the district court failed to develop a sufficient factual basis in light of *Bailey*).

Petitioner does not contend that *Bailey* provides an automatic antidote for his § 924(c)(1) consecutive sentence. Had a factual basis been developed below, petitioner would have been asked by the district court whether he agreed or disagreed with the "on-the-record" recitations. That did not occur.

Post-*Bailey* cases have demonstrated that a properly taken plea could withstand *Bailey's* intervention. As example, in *United States v. Ruth*, 100 F.3d 111 (10th Cir. 1996), the court declined to vacate the § 924(c)(1) conviction and sentence. During *Ruth's* plea, the government's allocution revealed that *Ruth* had been involved with weapons on multiple occasions in connection with drug-related activity, 100 F.3d at 113. After the government's recitation of facts, the district court asked *Ruth, on the record*, whether he agreed with what the government attorney stated; *Ruth* responded affirmatively. *Id.* Given those facts, the reviewing court sustained the guilty plea and sentence.[12] Similarly, in *United States v.*

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[11] (...continued)
not amenable "plain" versus "harmless error" analysis, 97 F.3d at 475, n. 3 (contrasting the D.C. Circuit (reversible unless government demonstrates harmless error) with Seventh and Ninth Circuit decisions applying plain error review).

[12] The Tenth Circuit has held *Bailey* retroactive for § 2255 determinations, *United States v. Barnhardt*, 93 F.3d 706, 708-10 (10th Cir. 1996); the Seventh Circuit has ruled otherwise, *Nunez v. United States*, 96 F.3d 990, 992 (7th Cir. 1996; Easterbrook, J.).

Elder, 88 F.3d 127, 129 (2nd Cir. 1996), the defendant sought to have his guilty plea to § 924(c)(1) vacated, claiming that *Bailey* mandated such relief. The Second Circuit declined, finding that Elder had stipulated to sixteen attempted or completed truck hijackings and that in three of those he "brandished a firearm," 88 F.3d at 129. The Second Circuit held that those clear admissions established § 924(c)(1) "use." *Id.*

Post-*Bailey*, the "carry" prong of § 924(c)(1) continues to be the subject of attempted clarification. In *United States v. Foster*, 96 F.3d 1177, 1178 (9th Cir. 1996), the court held that the defendant's loaded pistol in the back of the defendant's truck was not "immediately available for use" and therefore *Foster* could not stand convicted of either use or carry under § 924(c)(1); *United States v. Hayden*, 85 F.3d 153, 162 (4th Cir. 1996) (weapon not displayed, but carried by defendant during drug transaction sufficient for carrying. As previously noted in this petition, there never was a robbery, and no weapon was ever seen by any putative robbery victim). Hence, the "carry" prong cannot be sustained in this case.

CONCLUSION

QUESTION I

The Court has not retreated from *McCarthy's* prescriptions regarding the plenary compulsion of Rule 11 compliance. This petition seeks review of the lower court's opinion, which essentially discards *McCarthy's* salutary theme. The district court eschewed factual basis exploration based on the statements of counsel and a plea agreement. The count of conviction impleaded 18 U.S.C. §§§ 2, 924(c)(1) and 1951. Complexity notwithstanding, the record below fails to demonstrate any factual basis sufficient to demonstrate that the plea was knowing and voluntary. As such, the lower court's decision clearly conflicts with *McCarthy*, *Libretti*, and cited sister circuit opinions.

QUESTION II

Beyond cavil, *Bailey v. United States*, for the first time, defined and narrowed the "use" prong of 18 U.S.C. § 924(c)(1). In *Bailey's* wake, the courts of appeals are consistently reversing trial and guilty plea § 924(c)(1) convictions, with their concomitant mandatory consecutive sentence. Most of the guilty plea vacations arise from the failure of the district court to develop a "use and/or carry" factual basis, consistent with *Bailey's* narrowing interpretation of the statute.

Here, the district court failed to develop any § 924(c)(1) factual basis, beyond referring to a plea agreement. The court below, in contrast to its sister circuits, affirmed. Petitioner is serving a consecutive five-year sentence where the Rule 11 record fails to even arguably support that consecutive sentence.

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-3594

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARCO DAMICO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 CR 723—**Blanche M. Manning,** *Judge.*

ARGUED MARCH 29, 1996—DECIDED NOVEMBER 8, 1996

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

ROVNER, *Circuit Judge.* In a detailed plea agreement, Marco Damico admitted that for approximately fifteen years, he headed a criminal enterprise that regularly engaged in illegal acts such as extortion, armed robbery, and the operation of gambling and bookmaking businesses. He pled guilty to a series of charges addressed to these activities, the most serious being a conspiracy to conduct the affairs of the enterprise through a pattern of racketeering activity and the collection of unlawful debt in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). In furtherance of the RICO conspiracy, Damico also conspired to rob at gunpoint the

participants in a card game scheduled to take place near Lake Geneva, Wisconsin in November 1989. He therefore also pled guilty to the charge of knowingly using or carrying a firearm during and in relation to a crime of violence, which carries a mandatory consecutive prison sentence of five years. 18 U.S.C. § 924(c)(1). After accepting Damico's guilty plea, the district court sentenced him to a prison term of 147 months—87 months for the RICO conspiracy to be followed by the mandatory 60-month term for the firearm conviction. In this appeal, Damico raises three challenges to that sentence. After oral argument, moreover, Damico requested and received permission to file a supplemental brief addressed to the impact on his firearm conviction of the Supreme Court's intervening decision in *Bailey v. United States*, 116 S. Ct. 501 (1995). We now affirm that conviction as well as the sentence imposed below.

I.

Count V of the government's superseding indictment charged Damico with conspiring to rob the participants in the Lake Geneva card game in violation of 18 U.S.C. § 1951. The government alleged that this conspiracy extended from October 3, 1988 to November 30 of the following year, and that Damico's primary co-conspirator in this endeavor was Robert M. Abbinanti. The indictment charged the conspirators with agreeing, at Damico's direction, that a .22 caliber handgun with a silencer would be provided to Abbinanti for use in the robbery. The indictment further alleged that Damico had discussed the robbery with government informant Robert Cooley, who apparently would be participating in the card game, and that in one of their conversations, Damico had stated that there would be no heroes once the card players were confronted with shotguns. According to the government, Abbinanti then traveled to Wisconsin with the silencer-equipped handgun on November 29, 1989, for the purpose of committing the

robbery. For a variety of reasons, however, he never carried out the robbery. Count VI of the superseding indictment charged Damico and Abbinanti with violating 18 U.S.C. § 924(c)(1) by knowingly using or carrying the .22 caliber handgun with silencer during and in relation to the crime of violence (*i.e.*, the conspiracy to commit robbery) charged in count V. (*See* R. 7 at 15-18.) Damico pled guilty to count V but not to count VI. He instead entered a plea of guilty to a one-count information also charging a section 924(c)(1) violation but omitting any mention of the silencer. (R. 197.) That meant that the mandatory consecutive sentence required by section 924(c)(1) was reduced from thirty years (for a silencer-equipped firearm) to five years. *See* 18 U.S.C. § 924(c)(1).

In a detailed plea agreement, Damico stipulated to many of the facts alleged in the indictment. He admitted, for example, that he had conspired with Abbinanti and others to commit the Lake Geneva robbery and that the conspirators had agreed that Abbinanti would use a firearm in the course of the robbery. (R. 203 at 10.) Damico further acknowledged that in planning the robbery, he had inquired of Cooley whether any of the card game participants would bring pistols to the game and then told Cooley "that there would not be any heroes when [they] saw the shotguns." (*Id.* at 11.) Damico agreed that his co-conspirators had then traveled to Lake Geneva and were prepared to commit the robbery as planned. He conceded, in fact, that Abbinanti had "carried" a firearm to Wisconsin for the specific purpose of committing the robbery. (*Id.*) In entering his guilty plea in open court, moreover, Damico acknowledged the accuracy of the facts to which he had stipulated in the plea agreement. (R. 224 at 31.) The district court found that these admissions provided an adequate factual basis for Damico's plea. (*Id.* at 33.) *See* Fed. R. Crim. P. 11(f) (court must satisfy itself of factual basis for a guilty plea).

Despite these admissions, Damico now asks that we vacate his firearm conviction and remand to enable the district court to consider whether a section 924(c)(1) viola-

tion actually occurred. That unusual request is prompted by the Supreme Court's decision in *Bailey*, which was released after the entry of Damico's plea below and after the filing of his opening brief here. The Supreme Court held in *Bailey* that a firearm is not "used" for purposes of section 924(c)(1) unless it is "actively employed" during and in relation to the underlying crime of violence. 116 S. Ct. at 509. The Court explained that "active employment" would include such acts as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon, but would not encompass mere possession or storage, or the placement of the weapon nearby for later use, even if those acts served to embolden the defendant in committing the underlying offense. *Id.* at 508-09. By requiring that a firearm be "actively employed" to qualify as a "use," *Bailey* significantly narrowed the scope that this circuit had previously accorded to section 924(c)(1). *See, e.g., United States v. Gonzalez*, 93 F.3d 311, 318 (7th Cir. 1996); *United States v. James*, 79 F.3d 553, 553-54 (7th Cir. 1996). Damico now seeks to take advantage of *Bailey* to invalidate his earlier plea. Conceding that an adequate factual basis existed to support a statutory violation under our pre-*Bailey* law, he asserts that after *Bailey*, it is unclear whether the conduct acknowledged in the plea agreement still would violate the statute. For this reason, he asks that we vacate his firearm conviction and remand to the district court for further proceedings. *See United States v. Abdul*, 75 F.3d 327, 329-30 (7th Cir.) (vacating plea for knowing use of firearm where the admitted conduct would not constitute a "use" under *Bailey*), *cert. denied*, 116 S. Ct. 2569 (1996); *see also United States v. Robinson*, 96 F.3d 246, 254 (7th Cir. 1996) (factual basis for guilty plea may be insufficient where government proffered only that the defendant "possessed numerous weapons" in connection with a narcotics conspiracy). After reviewing Damico's admissions in the plea agreement and at the plea hearing, however, we are convinced that *Bailey* does not undercut the factual basis for his plea.

The government alleged and Damico admitted that during and in relation to the robbery conspiracy, he caused Abbinanti both to use and to carry a firearm. Although he thus admitted to violating both the "use" and "carry" prongs of section 924(c)(1), a violation of either prong would be sufficient, for the statute is phrased in the disjunctive. In narrowing the scope of the statute's "use" prong in *Bailey*, the Supreme Court emphasized that conduct not rising to the level of a "use" may still fall within the separate "carry" prong. 116 S. Ct. at 509; *see also United States v. Booker*, 73 F.3d 706, 709 (7th Cir. 1996) (*Bailey*'s holding "does not limit the 'carry' prong of § 924(c)."). Indeed, the need to preserve some independent meaning for the term "carry" proved central to the Court's construction of a "use," for the Court found nothing to indicate that Congress intended the two terms to be redundant. *Bailey*, 116 S. Ct. at 506-07, 509. The Court explained that:

> Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction.

Id. at 507. Thus, although neither of the two defendants in *Bailey* had "used" a firearm in the active-employment sense, the Court remanded for consideration of whether their convictions could be upheld under the separate "carries" prong. *Id.* at 509. Following that directive, this court has affirmed section 924(c)(1) convictions in the post-*Bailey* era where "the uncontested actions of a defendant clearly fit the definition of 'carry,' " even if they may not also qualify as a "use." *See Gonzalez*, 93 F.3d at 321 (discussing *United States v. Baker*, 78 F.3d 1241 (7th Cir. 1996)); *see also Booker*, 73 F.3d at 709.

The government believes that is the case here, and unfortunately for Damico, we must agree. Not only did Damico

generally admit to violating section 924(c)(1) both in his plea agreement and before the district court at the plea hearing, but he also acknowledged that in furtherance of the charged conspiracy, Abbinanti had "carried a firearm . . . for the specific purpose of robbing the card game in Wisconsin." (R. 203 at 11.) Thus, even if Damico may have relied on our pre-*Bailey* law in acknowledging a "use" of the firearm, he separately and specifically admitted that the firearm also had been "carried" during and in relation to the charged conspiracy. Damico does not suggest that in making that admission, he relied on any expansive pre-*Bailey* interpretation of the statute's "carry" prong. As a result, Damico's admission provides an adequate factual basis for his plea. *See United States v. Barnhardt*, 93 F.3d 706, 710-11 (10th Cir. 1996) (affirming conviction where defendant admitted at plea hearing that he "carried" a firearm during a drug transaction by tucking it into the back of his pants); *United States v. Rivas*, 85 F.3d 193, 195-96 (5th Cir. 1996) (admissions at plea hearing sufficient to show that firearm was "carried"); *United States v. Riascos-Suarez*, 73 F.3d 616, 623-24 (6th Cir.) (government's proffer at plea hearing sufficient to establish that firearm was "carried" when placed by the defendant in the driver's side console of his vehicle), *cert. denied*, 117 S. Ct. 136 (1996).

Damico nonetheless argues that because the record does not reveal precisely where the weapon was "carried," we should vacate his conviction to enable the district court to inquire further. Damico suggests that for all we know, the weapon was merely stashed in the trunk of Abbinanti's automobile, rather than within his reach inside the vehicle or under his clothing. According to Damico, the weapon would not have been "carried" under the firearm statute unless it was within Abbinanti's reach. *See Baker*, 78 F.3d at 1247 (holding that a defendant "carries" a weapon by transporting it in a car within his reach but reserving the question of whether a firearm locked in the trunk would also be "carried"); *see also United States v. Smith*, 80 F.3d 215, 221 (7th Cir. 1996). Even if Damico is correct

in anticipating how we might rule in a case involving a firearm locked in the trunk of an automobile, he should have considered that issue before admitting below that this weapon was "carried." There is nothing in the record to indicate that when Damico executed the plea agreement, he remained in the dark about where the firearm had been kept. If it was in the trunk, as Damico now suggests, then he should have refrained from acknowledging that the firearm ever was "carried." After all, the argument Damico now makes—that a firearm is not "carried" if only transported in the trunk of an automobile—was available under our pre-*Bailey* cases. *United States v. Edun*, 890 F.2d 983, 988 (7th Cir. 1989), in fact, expressly reserved that question while noting the difficulties other circuits have had in delineating the scope of the statutory term "carries." *Cf. United States v. Ocampo*, 890 F.2d 1363, 1371 (7th Cir. 1989) (defendant could be convicted of "carrying" a weapon that was hidden under automobile seat). Damico effectively waived the argument, then, by admitting as a background fact that his co-conspirator "carried" the firearm during and in relation to the underlying crime of violence. *See Edun*, 890 F.2d at 987-88 (defendant waived argument that firearm in vehicle's trunk was not "carried"). At the same time, that admission provides an adequate factual basis for Damico's plea.

II.

A.

Having dispensed with Damico's supplemental argument, we turn to the sentencing issues raised in his primary brief. Damico first contends that the district court erred in adding four points to his base offense level under U.S.S.G. § 3B1.1(a) to account for his leadership role in the racketeering conspiracy. That section authorizes a four-level enhancement "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more par-

ticipants, or was otherwise extensive." U.S.S.G. § 3B1.1(a).[1] Damico concedes that this enhancement would apply to his role in the overall RICO conspiracy but argues that because the base offense level applicable to that conspiracy was established via a cross-reference to the "underlying racketeering activity" (*see* U.S.S.G. § 2E1.1(a)(2)),[2] his role in the offense must be separately judged with respect to each underlying offense. That argument is based on Application Note 1 to section 2E1.1, which provides as follows:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, comment. (n.1). Damico argues that when the procedure required by the application note is followed here, the four-level enhancement would not apply because the particular racketeering offense used in establishing his base offense level did not involve "five or more participants" and was not "otherwise extensive."

We generally review a district court's conclusion about a defendant's aggravating role in the offense only for clear error. *E.g., United States v. Johnson-Dix*, 54 F.3d 1295,

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[1] Guideline references in this opinion are to the 1994 version, which was in effect on the date of Damico's sentencing.

[2] Section 2E1.1 provides:

> **Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**
>
> (a) Base Offense Level (apply the greater):
>
> (1) 19; or
>
> (2) the offense level applicable to the underlying racketeering activity.

1309 (7th Cir. 1995). In this case, however, Damico argues that the district court misconstrued the relationship between sections 2E1.1 and 3B1.1 of the guidelines. His argument therefore raises an issue of guidelines interpretation that we consider de novo. *See United States v. Tai*, 41 F.3d 1170, 1174 (7th Cir. 1994); *United States v. Ford*, 21 F.3d 759, 765 (7th Cir. 1994).

Note 1 of the commentary to section 2E1.1 provides that where the underlying racketeering activity includes more than a single substantive offense, each such offense must be treated as if "contained in a separate count of conviction" for the purpose of applying subsection (a)(2). U.S.S.G. § 2E1.1, comment. (n.1). The parties agree that under this application note, the underlying racketeering activity in this case is properly divided into four offense groups: (1) the illegal gambling and bookmaking businesses; (2) the conspiracy to rob the Lake Geneva card game; (3) the extortionate extraction of a street tax from and unlawful extension of credit to Robert Cooley; and (4) the extortionate extraction of a street tax from Richard Lantini. *See generally* U.S.S.G. § 3D1.2 (establishing grouping rules for related counts). Of these groups, the Cooley extortions produce the highest unadjusted offense level—a 20 pursuant to section 2E2.1(a).[3] The adjustments required by Chapter Three, Parts A through D, must then be applied to the subsection (a)(1) offense level of 19 and the subsection (a)(2) offense level of 20, with the subsection producing the greater overall offense level to be used in establishing the defendant's base offense level. U.S.S.G. § 2E1.1 comment. (n.1). Although the parties dispute how section 3B1.1 should be applied in this case, they ultimately agree that once the relevant Chapter Three adjustments are applied, subsection (a)(2) will produce the higher

[3] The gambling and bookmaking offenses are assigned an offense level of 12 pursuant to section 2E3.1, the conspiracy to commit robbery an offense level of 17 pursuant to sections 2X1.1 and 2B3.1(a), and the Lantini extortions an offense level of 18 pursuant to section 2B3.2.

overall offense level. That is because only the subsection (a)(2) offense level will receive a four-level adjustment under section 3D1.4 to produce the combined offense level for the four groups of racketeering offenses. *See* U.S.S.G. § 3D1.4. Subsection (a)(2) must therefore be used to establish Damico's base offense level for the racketeering conspiracy. *See* U.S.S.G. § 2E1.1, comment. (n.1).

With that as a given, the parties dispute whether the particular adjustment for Damico's aggravated role in the offense should address his role in the overall conspiracy, or only his role in the specific predicate offense from which his base offense level is derived. Damico concedes that if his role in the overall conspiracy is considered, then he qualifies for the four-level enhancement given to "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." *See* U.S.S.G. § 3B1.1(a). Yet he argues that because subsection (a)(2) applies to his case, only his role in the predicate acts of extortion may be considered. Although a defendant's aggravating role is judged in relation to the offense of conviction and all relevant conduct under section 1B1.3 (*United States v. Lewis*, 79 F.3d 688, 691 (7th Cir. 1996)), Damico asserts that the remainder of his racketeering conduct would not be considered relevant to the extortion-related conduct here. Under Damico's view, then, the four-level enhancement was improper because the extortion-related conduct involved but one person other than himself.

We rejected an approach similar to Damico's in *United States v. Morgano*, 39 F.3d 1358, 1379 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2559 (1995), observing that section 3B1.1's use of the phrase "criminal activity" is "broad enough to include the entire racketeering conspiracy rather than the particular predicate act alone." *Morgano* found support for this conclusion in the commentary to section 3B1.1, which instructs that " 'all persons involved during the course of the entire offense are to be considered' " in assessing whether criminal activity is "otherwise exten-

sive." *Id.* (quoting U.S.S.G. § 3B1.1, comment. (n.2)).[4] The government insists that *Morgano* is controlling, but not so fast says Damico. He contends that *Morgano*'s focus on the broad phrase "criminal activity" in section 3B1.1 fails to answer the argument he makes here based on the commentary to section 2E1.1. He asserts, in other words, that *Morgano*'s approach is inconsistent with Application Note 1.

But Damico's argument does not account for the fact that section 2E1.1's sole purpose is to establish the *base offense level* for a RICO offense, not the adjusted offense level. By using the offense level that would apply to the underlying racketeering activity unless that offense level is less than the minimum base offense level of 19, the guideline "ensures that a RICO defendant will not receive a *lesser* sentence than would attach to the underlying acts, simply by virtue of his having committed them in furtherance of a racketeering scheme." *United States v. Butt*, 955 F.2d 77, 89 (1st Cir. 1992) (emphasis in original). At the same time, however, the guideline also is designed to account for the fact that a particular offense used to establish the base offense level under subsection (a)(2) was committed in furtherance of a larger racketeering scheme. It does this through application of the Chapter Three adjustments to the base offense level that results. If Damico were correct that an adjustment like that in section 3B1.1 could be applied only to the predicate act used under subsection (a)(2), then a defendant convicted of organizing a far-reaching RICO enterprise could avoid the adjustment so long as that predicate act involved fewer than five participants and was not otherwise extensive. No account would be taken, then, of the fact that those participating in the isolated predicate act actually were acting in con-

[4] We applied an earlier version of the guidelines in *Morgano*. Under the 1994 guidelines, the quoted language appears in Application Note 3.

nection with a larger criminal enterprise. As we see it, however, section 2E1.1 was designed to take account of that fact.

Again, Damico points to Application Note 1, insisting that it requires the adjustments to be applied separately to each predicate act. But that note only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)"—that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as well to application of the Chapter Three adjustments. Although the note indicates that the adjustments are to be applied to the offense levels generated under subsections (a)(1) and (a)(2), that is for the purpose of determining which subsection will ultimately apply. In short, we see nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level generated under subsection (a)(2) in the same way that it would to any other base offense level—by looking to the count of conviction (the overall RICO conspiracy) and all relevant conduct within the scope of section 1B1.3. *See* U.S.S.G. § 3B1.1, Introductory Commentary.

We hold, therefore, that the predicate-by-predicate approach of Application Note 1 applies, as the note states, only for the purpose of establishing a RICO defendant's base offense level, and not for the purpose of applying the Chapter Three adjustments. The district court, then, properly looked to the overall racketeering conspiracy in assessing Damico's role in the offense under section 3B1.1.

B.

Damico next contends that the district court used the wrong criminal history category in determining his sentencing range. The court placed Damico in category III after assessing him four criminal history points—one point for a one-year sentence of supervision imposed on a 1984

battery conviction (*see* U.S.S.G. § 4A1.1(c)), one point for a one-year sentence of conditional discharge imposed on a 1989 reckless driving conviction (*see id.*), and two points because Damico committed the instant racketeering offense while under these sentences (*see* U.S.S.G. § 4A1.1(d)). Damico contends that the reckless driving sentence should not produce a criminal history point because under U.S.S.G. § 4A1.2(c)(1)(A), a sentence for careless or reckless driving is counted only if "the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days." The district court concluded that an Illinois sentence of conditional discharge is the equivalent of a sentence of probation for purposes of that guideline, but Damico insists that the two are distinct and that his reckless driving sentence does not qualify as a "term of probation."

Damico's argument, however, runs headlong into *United States v. Caputo*, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is to be equated with a "term of probation" for purposes of section 4A1.2(c)(1)(A):

> Probation means that the convicted defendant is not incarcerated but must comply with various conditions set by the sentencing court and monitored by a probation officer, such as periodic reporting, keeping out of trouble, and keeping clean of drugs. Conditional discharge is the same except that there is no probation officer, and in fact was introduced into Illinois law (we conjecture, with some support in Council Commentary, Smith-Hurd Ill. Stat. Ann. ch. 38 ¶1005-1-4, and Jay M. Hanson, "The Conditional Discharge—A New View in Misdemeanor Sentencing," 62 *Ill. Bar J.* 280 (1974)) as a way of coping with the shortage of probation officers. It is probation without the probation officer and that is a distinction without a difference so far as the purposes of the guideline exception is concerned.

Caputo also noted that the Sentencing Commission equates "unsupervised probation" with supervised probation under

a separate section of the guidelines, and because we viewed "unsupervised probation" as the equivalent of conditional discharge, we equated a sentence of that type with supervised probation as well. *Caputo*, 978 F.2d at 977 (citing U.S.S.G. § 4A1.1, comment. (n.4)); *see also United States v. Scott*, 19 F.3d 1238, 1246 (7th Cir.) (also equating conditional discharge with probation), *cert. denied*, 115 S. Ct. 163 (1994). The Eighth Circuit found *Caputo*'s analysis persuasive in *United States v. Lloyd*, 43 F.3d 1183, 1187-88 (8th Cir. 1994), and agreed that an Illinois sentence of conditional discharge qualifies as a "term of probation" under section 4A1.2(c)(1)(A). *See also United States v. Caswell*, 36 F.3d 29, 31 (7th Cir. 1994) (equating Kentucky sentence of "90 days' incarceration, suspended on condition that defendant not commit any theft-related services in Kentucky for two years" with a "term of probation" for purposes of section 4A1.2(c)(1)(A)); *cf. United States v. Labella-Szuba*, 92 F.3d 136, 138 (2d Cir. 1996) ("[E]very circuit that has compared a conditional discharge sentence to a sentence of unsupervised release has found them to be functionally equivalent."). *Caputo* dooms Damico's argument, and we are not persuaded by his diligent efforts to avoid its holding.

C.

We shall make short work of Damico's final argument—a challenge to the district court's two-level upward departure to account for his involvement in organized crime. Damico does not dispute the fact of his involvement; indeed, he stipulated below that the government's proof on that point was sufficient and expressly waived his right to challenge the sufficiency of that evidence on appeal. (R. 267.) His argument, rather, is that section 2E1.1 factors a defendant's involvement in organized crime into the base level applicable to a RICO offense. According to Damico, then, a defendant's involvement in organized crime does not qualify as an aggravating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating

the guidelines," making it an improper basis for upward departure. *See* U.S.S.G. § 5K2.0. We rejected the identical argument, however, in *United States v. Rainone*, 32 F.3d 1203, 1209 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2245 (1995), concluding that a defendant's involvement in organized crime is not reflected in the base offense level assigned to him under section 2E1.1. That is so regardless of whether the base offense level is established under subsection (a)(1) or (a)(2) of the RICO guideline, for neither the RICO statute nor the underlying offenses to which it applies are limited in application to defendants engaged in organized crime. Thus, when a nexus to organized crime exists, as it admittedly does here, it provides a proper basis for departure. *Rainone*, 32 F.3d at 1209.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 8, 1996

BEFORE:

Honorable FRANK H. EASTERBROOK, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge
Honorable DIANE P. WOOD, Circuit Judge

No. 95-3594

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCO DAMICO,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 94 CR 723, Blanche M. Manning, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 94 CR 723
v.	)	
	)	Honorable
MARCO DAMICO and	)	Blanche M. Manning
ROBERT M. ABBINANTI	)	

The UNITED STATES ATTORNEY charges:

On or about November 29, 1989 to on or about November 30, 1989, in the Northern District of Illinois, Eastern Division, and elsewhere,

MARCO DAMICO, and
ROBERT M. ABBINANTI,

defendants herein, did knowingly use and carry a firearm during and in relation to a crime of violence, for which the defendants may be prosecuted in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951, as more fully set forth in Count Five of the indictment in Case No. 94 CR 723;

In violation of Title 18, United States Code, Section 924(c)(1), and Title 18, United States Code, Section 2.

/s/ Scott R. Lassar
Acting United States Attorney

[Dated May 16, 1996]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 94 CR 723-1
	)	
MARCO D'AMICO	)	

ORDER

This matter comes before the court on the motion of defendant Marco D'Amico pursuant to 128 U.S.C. Section 2255, attempting to vacate the conviction and sentence which is predicated on a violation of 18 U.S.C. Section 924(c). For the following reasons, we dismiss defendant's motion.

As a preliminary matter, precedent in this district supports the proposition that a district court should not consider a 28 U.S.C. Section 2255 motion while a direct appeal is pending absent extraordinary circumstances. *See United States v. Robinson*, 8 F.3d 398, 406 (7th Cir. 1993). In other words, D'Amico should be precluded from raising the recent Supreme Court case of *United States v. Bailey* as a basis to vacate his conviction for the first time in this 2255 motion, without raising it in his appeal to the seventh circuit. His failure to raise this issue on direct appeal to the seventh circuit precludes him from doing so in this section 2255 motion. *Barker v. United States*, 7 F.3d 629, 631 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 939, 127 L.Ed.2d 229 (1994).

We are well aware that the Supreme Court just recently decided United States v. Bailey. Yet, Bailey was de-

cided six days before D'Amico filed his initial brief on appeal from his sentence. Further, our review of the file indicates that D'Amico still has not brought this argument to the attention of the Seventh Circuit. Most important, our review of D'Amico's respective pleadings does not provide this court with any extraordinary circumstances. Precedent in this district simply does not sanction a decision to entertain defendant's Section 2255 motion. See U.S. v. Robinson, 8 F.3d 398, 406 (7th Cir. 1993). Therefore, defendant D'Amico's motion to vacate pursuant to section 2255 is dismissed.

Date: May 16, 1996

/s/ Blanche M. Manning
United States District Court